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No. 85-293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OZARK AIR LINES, INC.,
Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

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STATEMENT OF THE CASE

Respondent Air Line Pilots Association ("ALPA") accepts Petitioner's statement of the case with the following additions and modifications.

Ozark Airlines and ALPA are parties to successive collective bargaining agreements that establish both a

regular and an occupational sick leave policy for Ozark's pilots. Regular sick leave may be taken at any time, while occupational sick leave is available only when a pilot suffers an "occupational injury." Under the agreement Ozark makes the determination whether a particular injury is an "occupational injury," but the term "occupational injury" is not expressly defined anywhere in the agreement. *See,* Appendix E, p. A-26, Petition for Certiorari.

Section 28 of the collective bargaining agreement also establishes an Adjustment Board, an arbitration panel required by the Railway Labor Act, for the purpose of resolving disputes arising from the interpretation or application of the contract. 45 USC §§ 153, 184. Section 28 provides that the Board's decisions "shall be final and binding upon the parties." *See also,* 45 USC § 153(m).

In 1978 and in 1981 ALPA filed grievances challenging Ozark's refusal to grant occupational sick leave, to two pilots who were admittedly injured while at work. Appendix F, p. A-29. Ozark denied the grievances and ALPA appealed to the Adjustment Board. Ozark, however, objected to the Board's jurisdiction and moved to dismiss the grievance arguing that the language of the agreement "When the company determines . . ." gave Ozark final, unfettered and unreviewable discretion to determine whether any pilot was eligible for occupational sick leave. Appendix D, pp. A-18-19; Appendix F, pp. A-28-29. Predictably, the four partisan Board members deadlocked on this issue and at ALPA's request a fifth neutral member was appointed by the National Mediation Board to break the deadlock. Appendix D at p. A-19. After a hearing, the Board ruled that the grievance was arbitrable.

Ozark then demanded that the neutral withdraw and that the case be remanded to the partisan four man Board for a hearing on the merits. ALPA objected to this procedure and argued that the neutral had been appointed to resolve the grievances, not just the preliminary jurisdictional question raised by Ozark. The Board ruled in ALPA's favor and the five man Board, as constituted, proceeded to hear the grievances. Appendix F at p. A-28.

Ozark again raised its contention that the language "when the company determines . . ." left it free to make any determination it saw fit, without review. Alternatively, Ozark argued that the term "occupational injury," because of past practice, required application of the strict standards of Missouri's Workmen's Compensation law in order to determine if an occupational injury occurred. *See Ozark's Petition for Writ of Certiorari* at pp. 3-4. In other words, Ozark argued that a pilot qualified for occupational sick leave only if his injury were compensable under state workmen's compensation law. *Id.;* Appendix F at p. A-32. ALPA, on the other hand, consistently argued that the term "occupational injury" means nothing more than an injury that occurred while on the job. Appendix F at p. A-31. After a full hearing, the Board ruled in ALPA's favor on the merits and found that the grievants were entiled to occupational injury pay. Appendix F.

Ozark refused to comply, commenced an action to vacate the award and ALPA counterclaimed to enforce it.

Ozark's contentions were rejected by the district court and by the panel of the Court of Appeals. Ap-

pendices B, E. However, the Court of Appeals granted rehearing en banc and, after argument, divided equally on the case. As a consequence, however, the Court vacated the prior panel opinion, published at 744 F.2d 1347 (1984), and affirmed the district court's judgment without opinion or comment. Appendix A at p. A-2.

In its Petition for Certiorari, received by ALPA on August 21, 1985, Ozark has abandoned its contention that the five man Board acted improperly by hearing the grievances on the merits without first remanding them to the partisan four member Board. Ozark's only contention here is that the District Court and Court of Appeals acted improperly when they failed to set aside a Railway Labor Act Adjustment Board arbitration decision because the Board, in Ozark's view, exceeded its jurisdiction by examining negotiating history in order to interpret "unambiguous" contract language. As we will now show, however, nothing in this case warrants this Court's intervention.

ARGUMENT

In its Petition for Certiorari Ozark asks this Court to "clarify the principles governing review of arbitration awards [in labor cases] previously stated in *Enterprise Wheel.*" Petition at 9. However, Petitioner is wrong in asserting that this case is governed by principles established in the Steelworkers Trilogy. *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564; *United Steelworkers* v. *Warrior & Gulf Navigation,* 363 U.S. 574; *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). The Trilogy arose under a different statute, the National Labor Relations Act, ("NLRA") 29 USC § 101, *et seq.,* where

arbitration of labor disputes is favored by federal labor policy, but is voluntary between the parties. *Nolde Bros.* v. *Bakery Workers,* 430 U.S. 243, 254 (1977); *Gateway Coal Co.* v. *UMWE,* 414 U.S. 368, 377 (1974).

The Railway Labor Act, ("RLA") on the other hand, *specifically requires* the arbitration of contract disputes before Adjustment Boards. 45 U.S.C. §§ 153, 184. *Brotherhood of Locomotive Engineers* v. *Louisvillle & Nashville R.R. Co.,* 373 U.S. 33, 38 (1963); *Intn'l Assn. Machinists* v. *Central Airlines,* 373 U.S. 682 (1963); *Andrews* v. *Louisville & Nashville R.R. Co.,* 406 U.S. 320 (1972). The RLA specifies that the awards of Adjustment Boards "shall be final and binding upon both parties to the dispute," and that Adjustment Boards are empowered to issue orders "to make the award effective." 45 USC § 153, First (m) (o). The RLA also provides that the district courts may entertain actions to enforce board awards and to review them, but only to the following, very limited extent:

> [The court may] enforce or set aside the order of the division of the Adjustment Board; *Provided, however,* That such order may not be set aside except for (1) failure of the division to comply with the requirements of this chapter, (2) for failure of the order to conform or confine itself, to matters within the scope of the division's jurisdiction, or (3) for fraud or corruption by a member of the division making the order.
>
> 45 USC § 153, First (p) and (q).

Thus, this Court has instructed that contract disputes subject to the Railway Labor Act are "finally, completely and irrevocably settled by the [Adjustment]

Board's decision" and that the federal courts must enforce Adjustment Board awards, like the award Ozark challenges here, unless one of the three statutory grounds is established. *Gunther* v. *San Diego & Arizona Eastern R. Co.*, 382 U.S. 257, 261 (1965). Only six years ago, this Court once again reaffirmed this standard of review describing it as "among the narrowest known to the law." *Union Pacific Railroad Co.* v. *Sheehan*, 439 U.S. 89, 93 (1979):

> Section 153, First (q) unequivocally states that the "findings and order of the [Adjustment Board] shall be conclusive on the parties" and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. (citations omitted)
>
> *Sheehan, supra.*

Both of the courts below applied these settled principles in this case. *See* Appendix D, pp. A-19-21; Appendix B at pp. 6-7. Petitioner is not, therefore, seeking a "clarification" of the principles of review applicable to Railway Labor Act Adjustment Board awards. Instead, Ozark seeks a relaxation of the narrow, statutorily mandated standard of review so that successful challenges to arbitral awards will no longer depend on "rare circumstances," and judicial review will be reestablished and expanded "over the concededly broad powers of arbitrators." Petition at p. 9.

Ozark advances two contentions in support of its Petition for Certiorari: First is the contention that the Eighth Circuit Court of Appeals has "so substantially deviated" from established judicial principles that judicial review of arbitration awards has been

"eliminate[d]." Second, that the decision in this case conflicts with the decision in *Torrington Co.* v. *Metal Products Workers Local 1645,* 362 F.2d 677 (2d Cir. 1966). *See,* Petition at p. 13.

Neither contention is true nor do they support any action or intervention by this Court. First, and perhaps most important, is the fact that the Eighth Circuit Court of Appeals has issued *no* decision and *no* opinion in this case. The Eighth Circuit Court of Appeals en banc expressly noted that the panel opinion at 744 F.2d 1347 (1984) was vacated and simply affirmed the district court's *judgment* by an equally divided vote. (Appendix A at A-2). Thus, there is *no* published opinion or decision of the Court of Appeals that follows, deviates or affects in any way established legal principles, or that can be said to be in conflict with *Torrington,* or any other decision. Moreover, the Court of Appeals action in affirming the judgment of the district court, without mention of the district court's opinion, leaves even that unpublished decision with little, if any, precedential value.

As a result of the Court of Appeal's action after rehearing en banc, nothing has happened and nothing has changed, in a jurisprudential sense, because of this case. There is, therefore, nothing for this Court to correct or to do here.

Second, there has been no deviation from established principles. Ozark's principal contention in this regard seems to be that the arbitrator failed to enforce "unambiguous" contract language. *See,* Questions Presented for Certiorari, *Petition* at p. i. Since some courts have refused to enforce arbitration awards contrary to "unambiguous" contract language, Ozark argues that

established principles have not been honored. *See, e.g., Torrington, supra; St. Louis Theatrical Co.* v. *St. Louis Theatrical Brotherhood Local 6,* 715 F.2d 405 (8th Cir. 1983) (awards set aside; contrary to unambiguous language); *contra, Loveless* v. *Eastern Air Lines,* 681 F.2d 1272 (11th Cir. 1982); *International Union* v. *White Motor,* 505 F.2d 1193 (8th Cir. 1974) (awards enforced; contrary to language, but latent ambiguity found and award supported by negotiating history or other extrinsic evidence). This argument might have some merit if there was agreement that the disputed language was, indeed, unambiguous.

However, the central dispute between the parties was the meaning of the contract language: "When the Company determines that an employee has an occupational injury . . ." At least three different interpretations of that language were presented to the Board. *See supra,* at pp. 2-3; Appendix F at pp. 31-32. The Adjustment Board concluded that the language was ambiguous and that the evidence of negotiating history supported ALPA's claim that this recently negotiated, disputed language was intended to do two things: (1) to require Ozark to make the "occupational injury" determination without awaiting a decision by the state Workmen's Compensation agency, and (2) to sever the previous connection between eligibility for "occupational" sick leave and compensability under state Workmen's Compensation law. Appendix F at pp. 30-38.

Ozark attempts to support its claim that the language is clear with the misleading contention that the Board found the disputed language to be unambiguous. Petition at pp. 6-7. However, it is only by taking the

Board's language out of context, that Ozark suggests a result directly contrary to the Board's true conclusion:

> "The language, in light of the bargaining history, is reasonably susceptible of the interpretation urged by [ALPA]. The Board must conclude that *the disputed language is not so clear and unambiguous* . . . as to preclude the Board's consideration of bargaining history . . ."
>
> Appendix F at p. 34. (emphasis supplied)

Later, both the district court and the panel of the Court of Appeals agreed with the Board that the contract was ambiguous. For example, the panel majority stated at 744 F.2d at 1349:

> The agreement nowhere defines "occupational injury." Neither is the language "when the Company determines that an employee has an occupational injury" so clear and explicit a reservation of exclusive authority to Ozark as to preclude the board from looking to plainly relevant extrinsic sources or discern what the parties meant by the language. Confronted by a dispute between the parties over the meaning of the provision, the Board had the authority to look beyond the language of the agreement to determine the meaning of the terms in question.

Of course, these statements do not represent a deviation from established principles. On the contrary, the Adjustment Board, the district court and the Court of Appeals were simply following this Court's pronouncement in the *Trilogy* that labor arbitrators "may of course look for guidance from many [extrinsic] sources" when interpreting bargaining agreements. *Enterprise Wheel and Car, supra,* 363 U.S. at 597.

Accord: Rainbow Glass Co. v. *Local Union No. 610,* 663 F.2d 814, 817 (8th Cir. 1981); *White Motor, supra; Loveless, supra; Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123, 1130 (3rd Cir. 1969). Circuit Judge McMillian, the panel's dissenter, expressed agreement with the rule that an "arbitrator may look for guidance outside the terms of the agreement to extrinsic or collateral sources, if there is a latent ambiguity." 744 F.2d at 1351. He dissented, not because he believed the majority deviated from the proper rule, but because he did not see any ambiguity; "the language . . . is plain and unambiguous." *Id.* Thus, there is no disagreement at all over the applicable rule of decision here, nor is there a conflict with the *Torrington* case. Instead, the real disagreement is whether the disputed contract language is ambiguous.

Similarly, the "conflict" with *Torrington* is simply a difference in outcome after application of this settled principle to the different factual situations found in the two cases: If disputed contract language is ambiguous an arbitrator may resort to extrinsic evidence, and if the contract is unambiguous, he may not. Thus, Ozark is asking this Court to involve itself in the *application* of settled legal principles to the discrete facts of this case and the unique, disputed contract language. Of course, there are no "special and important reasons" for this Court to address the extremely narrow question of the correct application of an undisputed legal principle to the text of an unusual phrase found in one collective bargaining agreement. Rule 17.1 Supreme Court Rules.

The real question raised by Ozark is the appropriate scope of review applicable to an arbitrator's deter-

mination that particular contract language is ambiguous. Ozark would apparently allow a greater scope of review by federal courts of such arbitral determinations and would limit findings of "ambiguity to situations where there are "tensions between sections of the agreement or an ambiguity within a section." Petition at p. 7. Of course, ambiguity is not always so readily circumscribed. *See, generally, Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123, 1130 (3d Cir. 1969). Moreover, Ozark's desire for closer judicial review of labor arbitrators' determinations of "ambiguity" *vel non* and its attempt to carve out a class of issues—determinations of ambiguity—where labor arbitrators are more closely confined and limited in their decision making, is no different than similar attempts—rejected in the past by this Court—to distinguish categories of "purely legal issues" or "question[s] of procedure" where, it was argued, arbitrators should be more closely confined and judicial review should be broader. *Union Pacific R.R. Co.* v. *Sheehan,* 439 U.S. 89, 91 (1978); *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964). However, Ozark has articulated no better reasons for relaxing the standard of review applicable to arbitrators' determinations of ambiguity than those rejected in *Sheehan* and *John Wiley, supra.*

Nor is there any support in the Railway Labor Act for the idea that a particular class of Adjustment Board determinations can be singled out for greater judicial scrutiny. On the contrary, *all* contract disputes under the Railway Labor Act are decided by Adjustment Boards, not by the courts. *Order of Railway Conductors* v. *Pitney,* 326 U.S. 561 (1946); *Union Pacific Railroad* v. *Price,* 360 U.S. 601 (1959). Furthermore,

all Adjustment Board decisions are subject to the same, unchanging standard of review set forth in 45 USC § 153, First (p) and (q). Thus, the Board's determination here, that disputed language is ambiguous, is no different than the determination in *Sheehan* that this Court held "falls within the . . . language [of the statute] precluding judicial review." *Sheehan, supra,* at p. 94.

Finally, Petitioner argues that the Eighth Circuit has evidenced some confusion on the issue of the standard of review applicable to labor arbitration decisions, noting that the Court decided two other cases in 1984, *en banc,* that raised similar issues. *See* Petition at pp. 8-10. We note first that neither of the two cases identified by Petitioner arose under the Railway Labor Act. *Id.; see, Riceland Foods* v. *United Brhd. of Carpenters,* 737 F.2d 758 (8th Cir. 1984); *United Electrical, Radio and Machine Workers of America, Local 1139* v. *Litton Microwave Products,* 728 F.2d 970 (8th Cir. 1984). Moreover, even if the Petitioner's contention is true, no mischief has been done by the Court of Appeals internal problems that would warrant this Court's intervention in this case. As noted earlier, the Court of Appeals issued no decision or opinion and the outcome has been enforcement of the Adjustment Board award—clearly the outcome mandated by the Railway Labor Act, absent extraordinary circumstances not present here.

CONCLUSION

Ozark has identified no issues of consequence arising from this case and there are none. There is no decision or opinion of the Court of Appeals and, thus, no effect on, deviation from, or conflict with established legal principles or the decisions of other Courts of Appeals. On the contrary it is Ozark, in this Petition, that seeks an unwarranted and fundamental change in the long settled rule of law applicable to the judicial review of labor arbitration awards rendered by Adjustment Boards created pursuant to the Railway Labor Act. However, that rule of law, established by statute, has served well covered employers, their employees and the public interest. Ozark has set forth no reasons to reexamine that rule now and the petition for a writ of certiorari in No. 85-293 should, therefore, be denied.

Respectfully submitted,

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